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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1910

RADIOCALL PAGING SERVICE,
Petitioner,

VERSUS

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and ANSWERING, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OKLAHOMA

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June, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Respondent, Corporation Commission of Oklahoma, lacks the jurisdiction to issue a new license to operate a radio paging service	5
II. The issuance of a new certificate works so as to deprive the petitioner of his property without due process of law, and contrary to his right of equal protection of the laws	7
Conclusion	9
Appendix I—Title 17, O.S. §§201-205	i-ii
Appendix II—Title 47, U.S.C. §151	iii
Appendix III—Order of the Corporation Commission of the State of Oklahoma	iv-vii
Appendix IV—Opinion of the Supreme Court of the State of Oklahoma	viii-xiv
Appendix V—Order of the Supreme Court Denying Petition for Rehearing	xv

TABLE OF AUTHORITIES

CASES: PAGE

Green v. McElroy, 306 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) 8

NBC, Inc. v. Board of Public Utility Commissioners of New Jersey, 25 F.Supp. 761 (1938) 7

Oklahoma City v. Corporation Commission, 80 Okla. 194, 195 P.2d 498 (1921) 5-6

CONSTITUTIONAL PROVISIONS:

United States Constitution, Article VI, Clause 2 ..... 2-3, 7

United States Constitution, Amendment XIV 3

STATUTES:

17 O.S. §203 ..... 6, 7

18 O.S. §§201-205 ..... 3, 4, 6

28 U.S.C. §1257(3) 2

47 U.S.C. §151 ..... 3, 7

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CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and ANSWERING, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OKLAHOMA

Petitioner prays that a Writ of Certiorari issue to review the Judgment herein presented, of the Supreme Court for the State of Oklahoma, filed of record the 29th day of January, 1974, which became a final Judgment of that Court.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported as *Corporation Commission of the State of Oklahoma, and Answering, Inc.* v. *Radiocall Paging Service,* at 519 P.2d 1360.

JURISDICTION

The Judgment of the Supreme Court of Oklahoma, in the above-styled case, became final in Case No. 45,156, decided January 29, 1974. A Petition for Rehearing was timely filed and was denied on March 26, 1974. The case is cited at 519 P.2d 1360. The jurisdiction of this Court has been invoked pursuant to Title 28 U.S.C. §1257(3). All issues presented herein were raised below as indicated by the Opinion of the Supreme Court of Oklahoma. Those questions involved the issuance of a certificate of public convenience and necessity to Respondent, Answering, Inc., by Respondent, Corporation Commission; the decision of the Supreme Court of Oklahoma was adverse to the Petitioner.

Mr. Stephen Jones is a member in good standing licensed to practice before this Honorable Court.

QUESTIONS PRESENTED

I. Whether the Respondent, Corporation Commission of Oklahoma, has jurisdiction to issue a new license to operate a radio paging service.

II. Whether the issuance of a new certificate works so as to deprive the Petitioner of his property without due process of law and contrary to his right of equal protection of the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . and the judges in every state shall be bound thereby, any

Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

United States Constitution, Amendment XIV:

". . . (n)or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Title 18 O.S. §§201-205 are printed in accompanying Appendix I.

Title 47 U.S.C. §151 is printed in accompanying Appendix II.

STATEMENT OF THE CASE

The questions involved in this case request this Court to reach a decision as to whether or not the applicable laws and facts presented provide the Respondent, Corporation Commission of Oklahoma, the jurisdiction and authority to issue a new certificate of convenience and necessity to operate a one-way radio paging service.

Radiocall Paging Service, Petitioner, is a one-way radio paging service operating in the Oklahoma City area in the State of Oklahoma. The Petitioner has operated and conducted its services for fifteen (15) years and serves the general public of the Oklahoma City area.

The Respondent, Answering, Inc., is a telephone answering service and prior to its application with the Respondent, Corporation Commission, was not engaged in one-way paging services.

The Respondent, Corporation Commission of the State of Oklahoma, exercised jurisdiction and regulatory powers over radio paging services by virtue of statutory law set forth in Title 17 O.S. §201 to 205.

Prior to the application of Respondent, Answering, Inc., for a certificate of convenience and necessity to operate a one-way radio paging service, the Petitioner and Mobilfone Service provided the only one-way radio paging service offered to the general public in the Oklahoma City area.

In 1971 the Respondent, Answering, Inc., instituted Corporation Commission Cause No. 24,313 by filing therein its application for a certificate of convenience and necessity to operate in conjunction with its answering service a paging, or signaling service, in order that it might use one of two high-band frequency radio channels that were for the first time being made available by the Federal Communications Commission. The Petitioner and Mobilfone filed a protest to the above described application and raised the issues relevant to this Petition.

The other channel was allotted to Mobilfone by the Federal Communications Commission.

A hearing was subsequently held at which a great deal of evidence was presented including evidence that the paging service operated by the Petitioner was fulfilling the needs and expectations of the Petitioner's customers. It was not shown that the Petitioner or Mobilfone would not be able within a reasonable time to provide any additional service which was required or needed. It was affirmatively shown that the Petitioner and Mobilfone stood ready to

provide any services needed of a radio paging service in the Oklahoma City area.

After the hearing the Respondent, Corporation Commission, entered its Order No. 86,222, granting Answering, Inc., the authority to offer, in conjunction with its telephone answering service a one-way paging service on one of the two newly available high-band frequency channels. (Order No. 86,222 is set forth in full in Appendix III.) The Order specifically restricted the offering of such service to only "those persons who are also customers of the telephone answering service portion of Answering, Inc.'s operations."

The Petitioner was adversely affected by this Order and appealed it to the Supreme Court of Oklahoma on the grounds that the Respondent, Corporation Commission, was beyond its jurisdiction and that the evidence failed to support the Order.

The Supreme Court of Oklahoma subsequently affirmed the Order No. 86,222. This Petition for Writ of Certiorari follows that adverse decision.

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENT, CORPORATION COMMISSION OF OKLAHOMA, LACKS THE JURISDICTION TO ISSUE A NEW LICENSE TO OPERATE A RADIO PAGING SERVICE.

The Respondent, Corporation Commission of Oklahoma, is limited in jurisdiction and power when granting a license to radio paging services to that which is specifically provided for by the statutes. In *Oklahoma City* v. *Corpora-*

tion Commission, 80 Okla. 194, 195 P.2d 498 (1921), the Supreme Court of Oklahoma held:

> "The Corporation Commission has such jurisdiction and authority only as is expressly or by necessary implication conferred upon it by the Constitution."

The jurisdiction and power to grant certificates of convenience and necessity to operate a paging or signaling service is strictly limited by Title 17 O.S. §203 which is set out verbatim in Appendix I. It provides that no certificates are to be issued to persons other than present operators unless it is shown from evidence that the existing radio common carriers "have not and will not be able, within a reasonable time, to furnish the same or comparable services." Without such a showing, the Respondent, Corporation Commission, was without jurisdiction to grant a certificate of convenience and necessity to Respondent, Answering, Inc.

The record is void of any evidence or testimony that the Petitioner or Mobilfone refused to furnish the service; in fact, both Petitioner and Mobilfone indicated in a positive sense that they can and will furnish the requisite radio paging service.

It is further to be pointed out that what jurisdiction is conferred by Title 17 O.S. §§201-205 should be strictly limited to jurisdiction over the activities of radio common carriers and the methods and procedures which they use in providing their services. The statutes plainly do not provide an extension of jurisdiction by the Respondent, Corporation Commission, into the area of answering services. It is improper and against the weight of the law for the Respondent to so extend said jurisdiction.

The jurisdiction of the Respondent, Corporation Commission, is further to be limited by the powers granted to the Federal Communications Commission by virtue of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and Title 47 U.S.C. §151 *et seq.* The Federal Communications Commission has sole authority to govern the construction and operation of radio stations, *NBC, Inc.* v. *Board of Public Utility Commissioners of New Jersey*, 25 F.Supp. 761 (1938). For the Respondent, Corporation Commission, to assert in its Order, as it does, that it is authorizing the establishment of a radio station, it must overstep its boundaries and enter into the area reserved to the Federal Communications Commission.

A substantial issue is presented as to the jurisdiction of the Respondent, Corporation Commission, to enter an order such as Order No. 86,222 in light of the Statutes of the State of Oklahoma and the Constitution and Laws of the United States of America.

II.

THE ISSUANCE OF A NEW CERTIFICATE WORKS SO AS TO DEPRIVE THE PETITIONER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND CONTRARY TO HIS RIGHT OF EQUAL PROTECTION OF THE LAWS.

The effect of the Order of the Respondent is to deprive the Petitioner of his property right which was conferred on him by Title 17 O.S. §203, and further to preclude him from continuing in his occupation of operating a radio paging service, all of this was done in violation of the Petitioner's right to Equal Protection of the Laws and his right

to due process, provided by the United States Constitution, Amendment Fourteen.

Order No. 86,222 restricts the use of the high-band channels to be operated by the Respondent, Answering, Inc., only to those persons who also subscribe to the Respondent's anwering service. The record shows that the Petitioner offers his paging service to the customers of the approximate fourteen (14) different telephone answering services in the Oklahoma City area, about fifty (50%) per cent of the Petitioner's business is derived from the customers of the Respondent who also used the Petitioner's paging service. The restriction of the high-band channel to the use of the Respondent's customers will have a ruinous effect on the Petitioner's business depriving him of the valuable property interest he has in the radio paging service and precluding him from pursuing a legitimate occupation. This exclusion and deprivation will clearly be by virtue of the effects of the Order of the Respondent, Corporation Commission.

This Court has clearly stated in *Green* v. *McElroy*, 306 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), that the right to hold specific employment and to follow a chosen profession free from unreasonable Government interference comes within the protections of the Constitution.

The loss suffered by the Petitioner is one which is protected by the Constitution of the United States. The issue presented by this loss is of great significance in light of the expanded jurisdiction and power of the Corporation Commission of Oklahoma and of other regulatory agencies in general.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June, 1974

APPENDIX I

Title 17 O.S. §§201-205

§201. *Definition.*

The term "radio common carrier" shall include every person, firm, corporation or other legal entity operating or managing a radio system engaged in the business of furnishing for public use one-way or two-way radio communications and licensed as a miscellaneous common carrier by the Federal Communications Commission, but not engaged in the business of providing public landline message telephone service or public message telegraph service.

§202. *Certificate of Convenience and Necessity—Application.*

Every "radio common carrier" is hereby declared to be a public utility and subject to the jurisdiction of the Corporation Commission as to its rates, services, practices and charges. Every such "radio common carrier" shall be required to secure a certificate of convenience and necessity from the Corporation Commission of Oklahoma to begin or continue the construction or operation of any such radio common carrier system or to transfer or dispose of the ownership of the same where lawfully established. The Corporation Commission shall issue no certificate of public convenience and necessity for such construction and/or operation until a written application, on forms and in the manner prescribed by the Commission, has been filed. Such application shall be accompanied by an affidavit that notice of the intention to file the same has been published for two consecutive weeks in a legal newspaper of general circulation in the county where the base station of operation is proposed to be located. Such application shall further be accompanied by proof of mailing notice of intention to file

such application to the holders of all certificates for furnishing radio common carrier service within the area of normal communication by radio of such base station, to all landline telephone companies and to the chief executive officer of the city or town in which such base station is proposed to be located, or, if in a nonincorporated area, to such officer of the nearest city or town.

§203. *Exceptions as to Certain Existing Carriers.*

Persons, firms, corporations or other legal entities operating as "radio common carriers," as defined herein, at the time of the passage of this act, and holding certificates as miscellaneous common carriers from the Federal Communications Commission within the State of Oklahoma, and having a certificate heretofore issued by the Corporation Commission authorizing such service, shall be entitled to a certificate issued pursuant to this act without the necessity of giving notice, public hearing or proving a public need for said service. No certificates of public convenience and necessity shall be issued other than to the present operators mentioned above, unless it be shown from the evidence that the public convenience and necessity require the same, and that existing radio common carriers and/or landline telephone companies have not and will not be able, within a reasonable time, to furnish the same or comparable service.

§204. *Additional Channels or Frequencies.*

The provisions of this act shall not require any additional authority to add additional channels or frequencies to any lawfully established base station.

§205. *Rules and Regulations.*

The Corporation Commission is authorized to adopt all reasonable and necessary rules and regulations governing the issuance of certificate of convenience and necessity, the rates service, practice and charges of such radio common carriers.

APPENDIX II

47 U.S.C. §151

§151. *Purposes—Federal Communications Commission Created.*

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

APPENDIX III

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF ANSWERING, INC., FOR A RADIO COMMON CARRIER CERTIFICATE OF CONVENIENCE AND NECESSITY TO OPERATE A ONE-WAY SIGNALING SERVICE IN AN AREA IN THE FORM OF A CIRCLE HAVING A RADIUS OF FIFTEEN (15) MILES FROM A POINT APPROXIMATELY AT 1211 NORTH SHARTEL STREET, SAID POINT BEING IN THE CITY OF OKLAHOMA CITY, OKLAHOMA.	CAUSE NO. 24313 ORDER NO. 86222

PRE-HEARING CONFERENCE: March 10, 1971.

HEARING: March 16, 1971 before the Commission en banc; Oral Argument, July 6, 1971.

APPEARANCES: George L. Verity, Attorney for Applicant.

Howard K. Berry, Jr., Attorney for Applicant.

E. Melvin Porter, Attorney for Radio Call Paging Service.

Bill Andersen, Attorney for Mobilfone Service.

Jack A. Mattingly and Gerald H. Barnes, Attorneys for the Commission.

BY THE COMMISSION:

Now on the below-mentioned date, the Corporation Commission being regularly in session and the undersigned Commissioners being present and participating, this Cause comes on for further consideration.

This Cause concerns an Application by Answering, Inc. for a Radio Common Carrier One-Way Paging Certificate of Public Convenience and Necessity. Notice of the hearing scheduled in this Cause was given to all known interested parties and in addition the Commission directed notice by publication to be made by Applicant in Oklahoma County, Oklahoma.

Protests were filed by Radio Call Paging Service and Mobilfone Service and appearances were made by attorneys representing these two companies. A Pre-Hearing Conference was held on March 10, 1971 before the Commission en banc at which time all interested parties appeared, and Applicant, in compliance with the Commission's Order, offered in evidence and circulated copies of its testimony-in-chief and exhibits on which it intended to rely in the presentation of its case.

FINDINGS

1. By its Application, Answering, Inc. seeks a Radio Common Carrier Certificate of Public Convenience and Necessity to operate a one-way, high-band frequency radio signaling service in an area in the form of a circle within a radius of fifteen (15) miles from a point approximately at 1211 North Shartel Street, Oklahoma City, Oklahoma. Protestant Radio Call Paging Service presently operates a low-band frequency radio paging service in Oklahoma City, Oklahoma, and has approximately 250 subscribers. Protestant Mobilfone Service operates in Oklahoma City, Oklahoma a two-way radio common carrier communication service and also operates a one-way radio paging service on a secondary basis under these two-way channels.

Mobilfone Service presently has seventy-two (72) one-way radio paging subscribers in Oklahoma City.

2. In 1968, the Federal Communications Commission made available for one-way radio paging service in Oklahoma City two (2) high-band frequency channels. Applicant and Protestant, Mobilfone, presently have applications pending with the Federal Communications Commission for these high-band frequency channels. Radio Call Paging Service applied for one of these high-band channels but it was dismissed by the FCC as being filed out-of-time. Evidence was submitted by the parties that there were differences in effective range, quality of signal, etc. between high-band and low-band frequencies, but the Commission is of the opinion and finds that based on the evidence in this case, these differences are due merely to refinements in the art of radio communications and such differences do not render high-band and low-band radio paging as two distinct types of service.

3. Answering, Inc. is presently rendering a telephone answering service in Oklahoma City, Oklahoma and by virtue of this application wishes to add a one-way radio paging service to its telephone answering operation. Evidence offered at the hearing showed that there is a public need for one-way radio paging in Oklahoma City. The Commission is of the opinion that a telephone answering service offered in conjunction with one-way radio paging would be beneficial in serving this public need. The Commission further finds that no presently operating radio common carrier in Oklahoma City is currently offering this combination of telephone answering and radio paging and further, that no presently operating radio common carrier in Oklahoma City, Oklahoma, have, after opportunity to do so, offered the same or comparable service as that proposed by Applicant.

4. The Commission further finds that the Application of Answering, Inc. for a Certificate of Public Convenience and Necessity authorizing one-way radio paging service

should be granted insofar as it would serve the public by offering a combination of telephone answering service and one-way radio paging.

ORDER

IT IS THEREFORE THE ORDER OF THE COMMISSION that Answering, Inc. is hereby authorized to establish a one-way radio paging service within a reliable service area radius of fifteen (15) miles from a point at approximately 1211 N. Shartel Street, Oklahoma City, Oklahoma. Such authority of Answering, Inc. is hereby restricted to offering one-way radio paging service only to those persons who are also customers of the telephone answering service portion of Answering, Inc.'s operation. This Order shall serve as the Certificate of Public Convenience and Necessity hereby granted.

DONE AND PERFORMED this 18th day of August, 1971.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
CHARLES NESBITT, CHAIRMAN
RAY C. JONES, VICE CHAIRMAN

s/ Wilburn Cartwright
WILBURN CARTWRIGHT, MEMBER

ATTEST:

s/ Ed Overholser
ED OVERHOLSER, SECRETARY
GP

APPENDIX IV

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA
JAN 29 1974
Ross N. Lillard Jr.
CLERK

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and ANSWERING, INC., Appellees,	)	
vs.	)	No. 45,156
RADIOCALL PAGING SERVICE, Appellant.	)	

SYLLABUS

Where an existing radio common carrier operating a paging service over a low-band frequency radio channel in the Oklahoma City area protested the Corporation Commission's authorization, under the Radio Common Carriers Act [Title 17 O.S. 1971, §§ 201-205, both inclusive], of an Oklahoma City telephone answering service to use a newly available high-band frequency radio channel in connection with its answering service, and the evidence indicated a public need for such combined service and that the paging service had not furnished, and would not be able, within a reasonable time, to furnish the same or a comparable service, the Corporation Commission's Order allowing the answering service to offer such combined service to its cus-

tomers within a 15-mile radius of an antenna it proposed to build in Oklahoma City was not erroneous in the respects argued by the answering service in its appeal from said Order.

APPEAL FROM THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Appeal by a radio common carrier from an order of the Corporation Commission of Oklahoma granting a telephone answering service authority to use a high-band frequency radio channel for furnishing its customers a radio paging service in conjunction with its telephone answering service.

AFFIRMED

Jack A. Swidensky,
Attorney for Oklahoma Corporation Commission,
and
Gerald H. Barnes,
Assistant General Counsel,
Oklahoma Corporation Commission,
Oklahoma City, Oklahoma,

For Appellee, Corporation Commission of Oklahoma,

Berry & Berry,
Oklahoma City, Oklahoma,
and
Geo. L. Verity,
Brown, Verity, Brown & Baker,
Oklahoma City, Oklahoma,

For Appellee, Answering, Inc.,

E. Melvin Porter,
Oklahoma City, Oklahoma, For Appellant.

* * *

[APPENDIX]

BARNES, J.:

In 1968, the Federal Communications Commission, for the first time, made available, for one-way radio paging service in Oklahoma City, two high-band frequency radio channels.

In 1970, the Oklahoma Legislature enacted the "Radio Common Carriers" Act, Title 17 O.S. 1971, §§ 201 to 205, both inclusive. By said Act's Section 201, radio systems furnishing the public one-way, as well as two-way, radio communications systems, licensed by the Federal Communications Commission as miscellaneous common carriers, were defined as "radio common carriers," and Section 202 of the Act declared all such radio systems to be public utilities and subject to the jurisdiction of this State's Corporation Commission to grant them certificates of public convenience and necessity, and to otherwise regulate them as therein provided.

In 1971, Answering, Inc., the Oklahoma City operator of a telephone answering service, instituted Corporation Commission Cause No. 24,313 by filing therein its application for a certificate of convenience and necessity to operate, in conjunction with said service, a paging, or signaling, service using one of these two high-band frequency channels. Answering, Inc., alleged in it application that the subscribers to its answering service, and others in the Oklahoma City community, needed such a dual operation so that they could receive messages, regardless of where they happened to be, within a radius of 15 miles around a broadcasting antenna it proposed to build in Oklahoma City.

Roy Teel, Lowrey McKee, and Redco Corporation, d/b/a Mobilfone, filed a protest to the above described application, alleging, among other things in brief substance, that Mobilfone was already furnishing, under proper authorization, "one and two wave radio service including paging service in the area involved"; that it had the resources to furnish any additional service that might be

needed in the area involved, and that the public convenience and necessity does not require issuance of the additional authority applied for by Answering, Inc.

Radiocall Paging Service, which had been operating a one-way paging service on a low-band radio channel, also appeared in the case in opposition to Answering, Inc.'s application.

After a hearing before the Corporation Commission, at which Answering, Inc., and both protestants introduced evidence, said Commission entered its Order No. 86,222 granting Answering, Inc., the authority to offer, in conjunction with its telephone answering service, a one-way paging service on one of the two newly available high-band radio frequency channels, but specifically restricted this authority to offering such service "only to those persons who are also customers of the telephone answering service portion of Answering, Inc.'s operation."

As indicated by the caption of this case, Radiocall Paging Service appealed from this order, but Mobilfone did not. In its present appeal, Radiocall Paging Service, hereinafter referred to merely as "Radiocall," presents two questions, namely:

I. Does the evidence support the order?

II. In entering the order, did the Corporation Commission exceed its jurisdiction?

To support our giving an affirmative answer to the second question above set forth, Radiocall does not deny that the evidence before the Commission shows a public need for a radio paging service to be operated in connection with a telephone answering service in Oklahoma City, but it points out that, unlike Answering, Inc., it is an *existing* radio common carrier; and, upon the premise that there was no evidence before the Commission that it would not, or could not, furnish such service, it contends that said tribunal acted in violation of Title 17, § 203, supra, in granting

Answering, Inc., rather than it, the opportunity of furnishing such service.

Answering, Inc., does not deny that Radiocall is an "existing" radio common carrier, or "present" operator under the following provision of said Section 203, supra:

> " * * * *No certificates of public convenience and necessity shall be issued other than to . . . present operators . . . , unless it be shown from the evidence that* the public convenience and necessity require the same, and that *existing radio common carriers . . . have not and will not be able within a reasonable time, to furnish the same or comparable service.*" [Emphasis added.]

Answering, Inc., does, however, point to the testimony elicited before the Commission from Mr. C. B. Edwards, Radiocall's owner and manager, as contradicting Radiocall's above described representation as to the evidence and as supporting the following finding in the order appealed from:

> "The Commission further finds that no presently operating radio common carrier in Oklahoma City is currently offering this combination of telephone answering and radio paging and further, that no presently operating radio common carrier in Oklahoma City, Oklahoma, have, after opportunity to do so, offered the same or comparable service as that proposed by Applicant."

The testimony Answering, Inc., refers to appears in the following excerpt from Mr. Edwards' cross-examination:

> " * * * *
>
> "Q At page 3 of your Protest, I notice that you make this statement . . . : 'Radio call paging service has been requested many times to add telephone answering service in conjunction with its radio paging

station KJM-248, by subscribers and protective (*sic*) subscribers. A good percentage of those making request were and are subscribers to Answering, Inc. Telephone Answering Service.' Did you make that statement?

A That's very true.

* * * * * *

Q Well, don't you feel like . . . the public is entitled to what it has a need and convenience for?

A Well, we are not in the telephone answering business, actually. We are licensed by the federal government to run a radio paging station. . . .

* * * * * *

Q But you say that these people, many people, called you and told you that they wanted the same person to be giving their answering service that gives them their radio page.

A Right.

* * * * * *

"CHAIRMAN NESBITT: * * * You don't contemplate any installation of any answering service?

"WITNESS EDWARDS: No, sir, we do not propose to move over into their field."

It is our opinion, after carefully examining the evidence, that it supports the conclusion that Radiocall has not, and will not, within a reasonable time, furnish a combined telephone answering and radio paging service. We therefore find no merit to Radiocall's argument that the Commission was without jurisdiction under Section 202, supra, to enter the order herein appealed from.

Nor do we agree that said order is unwarranted in the other respects claimed by Radiocall. With reference to the question it has raised as to said order being supported by the evidence, Radiocall advances two arguments. It first contends that the Commission is obligated to distribute

all available radio wave lengths so as to give the greatest possible service, and it maintains that the Commission's order allowing Answering, Inc., to use one of the only two available high-band frequency radio channels only to service those who also subscribe to its telephone answering service will not furnish the public the greatest possible use of said channel. Radiocall also says that the answering service customers of Answering, Inc., make up about 15% of its radio paging customers, and that, if it loses these, its business will be ruined, and others in the business will be dealt "an unfair competitive disadvantage."

Our answer to the first of the two above contentions is that the order appealed from does not restrict the use of the subject radio channel to customers of Answering, Inc., —it only restricts the latter's use of said channel to servicing them.

Our answer to the second of the above contentions is that public needs cannot go unserved because of claimed preferential rights of an existing common carrier. As to this aspect of the case, our interpretation of Section 203, supra, is consistent with this Court's previous interpretation of Title 17 O.S. 1971 and 1951, § 131. As to the latter statute, in Blakeley v. Corporation Commission, Okl., 332 P.2d 1103, 1108, we said:

> "It is argued by McLoud Exchange that the order of the Commission authorizes an invasion by Bell of the McLoud Exchange area, contrary to the provisions of 17 O.S. 1951 § 131, supra. We have already noted that the statute authorizes an invasion when public necessity and convenience so requires. * * * "

As we have found in the arguments presented by Radiocall no sufficient ground for disturbing the order appealed from, said order is hereby affirmed.

DAVISON, C.J., WILLIAMS, V.C.J., and IRWIN, BERRY, LAVENDER, SIMMS and DOOLIN, JJ., concur.

APPENDIX V

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

March 26, 1974

The petition for rehearing in the following cases is denied . . . 45,156, Corporation Commission, et al. v. Radiocall Paging Service.

Attest:

Ross Lillard
Clerk

CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court for the State of Oklahoma was mailed by United States mail, postage prepaid, to:

Mr. Jack Mattingly and
Mr. Gerald H. Barnes

Attorneys for the State Corporation
Commission of Oklahoma
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

Mr. George Verity

Attorney at Law
Anwering, Inc.
First National Center
Oklahoma City, Oklahoma 73102

Mr. Howard K. Berry, Jr.

Attorney at Law
Answering, Inc.
Cravens Building
Oklahoma City, Oklahoma 73102

this ..... day of June, 1974.

TABLE OF CONTENTS

	PAGE
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions	2
Statement of the Case	3
Argument and Authorities	6
Proposition I: The Oklahoma Corporation Commission properly exercised its authority in granting Respondent a Certificate of Convenienec and Necessity	6
Evidence Supporting the Need for Certificate of Convenience and Necessity Issued to Respondent	9
Conclusion	11

APPENDIX

Exhibit 19 of Appeal Record	i

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

Oklahoma Contsitution, Art. IX, § 18	2, 6

STATUTES:

17 O.S. §§ 201-205	2, 6
17 O.S. § 202	3

In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. 73-1910

RADIOCALL PAGING SERVICE,
Petitioner,

VERSUS

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and ANSWERING, INC.,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Answering, Inc., would show that Radio Call Paging Service's Petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Oklahoma should be denied.

JURISDICTION

Respondent would submit that no federal question is really involved in this matter, and that Petitioner's real position is the same as presented to the Supreme Court of Oklahoma, *i.e.*, that the Order of the Oklahoma Corporation Commission which is complained of, was granted without being supported by the evidence. From this, Petitioner suggests that his constitutional rights have been infringed. Respondent denies such suggestion.

QUESTION PRESENTED

1. Whether or not the Oklahoma Corporation Commission has jurisdiction to issue a Certificate of Convenience and Necessity for the Operation of radio paging service.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article IX, § 18 of the Oklahoma Constitution:

> "Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers
>
> "The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications of traffic, and rules and regulations, and requirements, the Commission may, from time to time, alter or amend. * * * "

Title 17, §§ 201-205 printed in Appendix I to Petitioner's Brief (erroneously cited on page 3 of Petitioner's Brief as being Title 18 O.S. §§ 201-205, but correctly appearing in its Appendix).

STATEMENT OF THE CASE

This case arose in the Oklahoma Corporation Commission when Respondent filed an Application for a Certificate of Convenience and Necessity to operate a one-way radio paging service. Such Application was filed shortly after April of 1970, the date when the Oklahoma Legislature adopted the Act prescribing regulation of radio common carriers. 17 O.S. § 202 (See Appendix I of Petitioner's Brief).

Prior to filing the above referenced Application, the Respondent had filed an Application with the Federal Communications Commission for the issuance of a license for operating a one-way radio paging service on a newly allocated high band (guard band) radio channel. The F.C.C. had, shortly prior thereto, allocated two such channels for exclusive use in radio paging. Respondent has now been authorized to install equipment for the operation of one of such high band channels by the F.C.C.

The Petitioner is a radio common carrier operating a low band radio paging service. Petitioner is owned by Cyrus von Edwards, who operates under such assumed name.

After full hearing, the Oklahoma Corporation Commission granted a Certificate of Convenience and Necessity to the Respondent. The Petitioner appealed to the Oklahoma Supreme Court, which Court affirmed such decision in an opinion reported at 519 P.2d 1360.

In the Petitioner's appeal to the Oklahoma Supreme Court, he pleaded basically the same points of law as presented to this Court.

In rendering its Order granting the Certificate of Convenience and Necessity to the Respondent, the Oklahoma Corporation Commission determined in part as follows:

> "Evidence offered at the hearing showed that there is public need for one-way radio paging in Oklahoma City. The Commission is of the opinion that a telephone answering service offered in conjunction with one-way radio paging would be beneficial in serving this public need. The Commission further finds that no presently operating radio common carrier in Oklahoma City is currently offering this combination of telephone answering and radio paging and further, that no presently operating radio common carrier in Oklahoma City, Oklahoma, have, after opportunity to do so, offered the same or comparable service as that proposed by Applicant."

This Order was supported by ample testimony given by medical doctors, elevator service repairmen, as well as other repairmen, and a witness for a suburban fire department, all of whom testified that there was urgent need for a radio paging service to be operated in conjunction with a telephone answering service.

Although Petitioner contends in its Brief that a "great deal of evidence" was presented that Petitioner was fulfilling the needs of the public (page 4 of Petitioner's Brief), the truth of the matter is that the Petitioner only presented testimony from himself regarding this matter[1] and he admitted that, although he had been requested many times to add telephone answering service in conjunction with his radio paging service, he refused to offer answering service.

---

[1] Petitioner presented only one witness other than himself, which witness testified only to technical matters concerning radio paging equipment.

When questioned by the Chairman of this Commission in this regard, he made the following answers (Appeal Record No. 45156, page 232 filed with the Oklahoma Supreme Court):

> "CHAIRMAN NESBITT: You have no answering service in connection with Radiocall?
>
> "WITNESS EDWARDS: No, sir, I do not. We are licensed by the federal government as a one-way radio paging service to serve the community.
>
> "CHAIRMAN NESBITT: You said that. You don't contemplate any installation of any answering service?
>
> "WITNESS EDWARDS: No, sir, we do not propose to move over into their field."

Respondent submits that the Petitioner's case involves nothing more than a question of whether or not the Order of the Commission is supported by the evidence and that this Court should not be required to consider the matter. Petitioner alleges that his constitutional rights have been invaded, claiming that he should have the exclusive right to render one-way paging service, without regard to the rights of the public to be served in connection with their needs. We submit the following argument and authorities.

ARGUMENT AND AUTHORITIES

PROPOSITION I

THE OKLAHOMA CORPORATION COMMISSION PROPERLY EXERCISED ITS AUTHORITY IN GRANTING RESPONDENT A CERTIFICATE OF CONVENIENCE AND NECESSITY.

The Oklahoma Constitution at Article IX, Section 18 (quoted in part heretofore) grants the Oklahoma Corporation Commission power and authority to regulate and control all transmission companies; however, it was not until April 7, 1970 that the Legislature provided any statutes for regulation and control of radio common carriers, leaving the field exclusively to federal control. On that date, they adopted the Oklahoma Statute regarding regulation of radio common carriers, which appears at 17 O.S. §§ 201 through 205 (see Appendix I to Radiocall's Petition for Writ of Certiorari). Without this Statute, the Respondent was in no wise required to obtain a Certificate of Convenience and Necessity, and if this Court were to strike such Statute down, as Petitioner seems to require at page 5 of his Petition, then the appeal would be rendered moot because Respondent could operate as a radio common carrier in Oklahoma without any regulation.

The Respondent and one other Oklahoma company were the only timely applicants for a license from the Federal Communications Commission for the two high band radio paging channels set aside by the federal government for radio paging.

However, as we previously pointed out, although Petitioner would seem to require that the authority of the Okla-

homa Corporation Commission to regulate one-way radio paging be struck down, this would not serve his purpose for it would leave the Respondent free to operate in Oklahoma without any Certificate of Convenience and Necessity[2] and we believe that his real point is merely the weight of the evidence in support of the Commission Order. At page 6 of the Petition, Petitioner states:

> "The record is void of any evidence or testimony that the Petitioner or Mobilfone refused to furnish the service; in fact, both Petitioner and Mobilfone indicated in a positive sense that they can and will furnish the requisite radio paging service."

This statement of Petitioner is extremely misleading for the public need and convenience determined by the Commission was that the Oklahoma City public needed a paging service to be operated in conjunction with an answering service, and Petitioner not only does not render such service, but refuses to consider rendering the same. We quote from the Oklahoma Supreme Court Appeal Record, pages 231, 232:

> "Q. At Page 3 of your protest, I notice that you make this statement and I quote the second paragraph on that: 'Radio call paging service has been requested many times to add telephone answering service in conjunction with its radio paging station KJM-248, by subscribers and protective (prospective) subscribers. A good percentage of those making request were and are subscribers to An-

[2] In this regard see the letter attached as Appendix I written by the General Counsel of the Oklahoma Corporation Commission on May 19, 1969 setting out that no certificate was required. Such letter, of course, antedates the Oklahoma Radio Common Carrier Statute and would be the situation in Oklahoma if the statute was declared unconstitutional.

swering Service.' Did you make that statement? (Parenthesis added.)

A. That's very true.

Q. That's a true statement?

A. Yes, we've been requested to provide answering.

Q. Well, don't you feel like that the public is entitled to what it has a need and convenience for?

A. Well, we are not in the telephone answering business, actually. We are licensed by the federal government to run a radio paging station to serve the community and—

Q. And you want to frustrate these people who call you and tell you that they want radio and answering service at the same place and not to allow them to have it, is that right?

A. Well, there's other answering services in Oklahoma City that can serve them. Very good answering services, too.

Q. But you say that these people, many people, called you and told you that they wanted the same person to be giving their answering service that gives them their radio page.

A. Right.

Q. And you don't think that those people should be permitted to have what they need?

A. There are answering services here available to them. It doesn't have to be combined."

Following this, Chairman Nesbitt of the Oklahoma Corporation Commission wanted to make certain that there was no misunderstanding about the matter, and he made

the interrogation of Mr. Edwards, the owner of Radiocall which was heretofore quoted under Statement of the Case.

Evidence Supporting the Need for Certificate of Convenience and Necessity Issued to Respondent

Contrary to the Petitioner's position that the evidence did not support the Order of the Oklahoma Corporation Commission granting Respondent a Certificate of Convenience and Necessity (such Order appears in full as Appendix III to Radiocall's Petition for Writ of Certiorari), the evidence presented by the Respondent was overwhelming. It showed that it was a necessity to the medical profession that the Respondent's answering service be able to page doctors. See testimony of Doctors John V. Bumpus (Oklahoma Supreme Court Appeal Record, page 140, *et seq.*) and V. A. Crockett (Oklahoma Supreme Court Appeal Record, page 192, *et seq.*).

The evidence showed that it was a necessity to the various service people serving the needs of the City in matters such as elevators in hospitals and public buildings, Xerox copy equipment and other repair services. See the testimony of Edmond J. Angelil (Appeal Record, page 102, *et seq.*), Jack Pearson (Appeal Record, page 156, *et seq.*) and Larry Flesner (Appeal Record, page 165, *et seq.*).

The record further reflected that suburban fire departments required that Answering, Inc. have one-way paging service in order that such fire departments could properly function in rendering fire protection to the public. In this regard, see the testimony of Joseph B. Weems of the Ni-

coma Park Fire Department (Appeal Record, page 110, *et seq.*).

In arriving at the conclusion which the Oklahoma Corporation Commission made prior to its issuing its Order granting the Respondent the Certificate of Convenience and Necessity which is here under attack, Chairman Nesbitt of the Oklahoma Corporation Commission, on the record, propounded a question to the parties before it, and then made response thereto which showed the analysis of the public convenience and necessity that required the Order which was issued granting Respondent its Certificate. We quote from pages 246, 247, of the Oklahoma Supreme Court Appeal Record:

> "CHAIRMAN NESBITT: What if we decide there is room for only a part of one, for only limited purposes, isn't that a proper determination of public convenience and necessity? . . .
>
> * * * * * *
>
> "CHAIRMAN NESBITT: All right. The reason I asked the question, Mr. Verity, was that we have a rather novel situation herein. Of course, I think we all recognize that. Where primarily answering service was supplemented by a new service, high band paging service. Mobilfone[3] is primarily two way ground communication with a supplemental or subsidiary or whatever you call them, service of paging. Here we have a third type, the radiocall type paging service exclusively and desire at least to remain in that business exclusively and not with the answering service together, I mean, also. So, we don't have any direct competition and it makes it more difficult to determine what the need of

[3] A protestant at the Commission level who did not appeal.

> the public is, because we have this problem of using one service in the pre-existing service *which is not complete,* or using pre-existing service which is a little different type and whether the broader service that the applicant proposes conflicts with their existing services are of a little different type or sufficiently that the public convenience and necessity is met or not." (Emphasis supplied.)

Thus, we see that the constitutional rights of the Petitioner have not been infringed; that actually he wants, under the guise of constitutional protection, to have the law allow him to operate a low band one-way radio paging service without any competition, irrespective of the fact that he admits that his service does not meet the needs and demands of the public. The federal Constitution does not grant such rights to any citizen. The Oklahoma Corporation Commission had the power and authority, under the Constitution and Statutes heretofore cited, to grant Certificates of Convenience and Necessity. It also had the duty under the evidence in this case to grant the Certificate of Convenience and Necessity which it issued to the Respondent. The Petition of Radiocall Paging Service should be denied.

CONCLUSION

In conclusion, Respondent would submit that the constitutional rights of the Petitioner have in no wise been infringed; that his Petition merely repeats the contention which he made to the Oklahoma Supreme Court, arguing that he should be given exclusive radio paging license, irrespective of the needs and demand of the public for the

operation of a radio paging service in conjunction with answering service; and that his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent,
Answering, Inc.

July, 1974

APPENDIX I

May 19, 1969

Mr. William A. Houser, President
Answering, Inc.
Suite 210, 100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Dear Mr. Houser:

Your letter of May 14, 1969, addressed to Mr. J. W. Robertson of this Commission, has been given to me for answer.

Under the facts and circumstances mentioned in your letter, it is my opinion that it would not be necessary for you to be certificated and/or show proof of convenience and necessity to the Oklahoma Corporation Commission. Your letter indicates and I am advised that your operation is not and will not be compatible to a miscellaneous common carrier, nor will such operation give you the capability of communicating with land lines.

Based upon my information and again, your letter, it would be my opinion that the Federal Communication Commission has preempted this area and it alone would have jurisdiction over the radio frequencies which you desire.

If I may be of any further help or assistance to you, please let me hear from you.

Very truly yours,

JAS:jb

Jack A. Swidensky
General Counsel

cc:

Mr. Howard K. Berry Jr.
Berry, Hammer & Berry
Suite 625-626 Cravens Building
Oklahoma City, Oklahoma 73102

[This letter is Exhibit 19 from the Appeal Record]

CERTIFICATE OF SERVICE

I, the undersigned, GEO. L. VERITY, attorney for the Respondent, ANSWERING, INC., do hereby certify that I have mailed three (3) copies of the foregoing Brief in response to the Petition for Writ of Certiorari in accord with the requirement of paragraph 1 of Rule 33 to Counsel of record for the Petitioner at the following address:

Mr. Stephen Jones
Jones, Williams, Bane, Ray & Klingenberg
525 Fidelity Plaza
Oklahoma City, Oklahoma 73102

I further certify that these Rules require service only on the above named attorney.

GEO. L. VERITY